No. 98-1036

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IN THE

Supreme Court of the United States

STATE OF ILLINOIS,

Petitioner,

—v.—

SAM WARDLOW,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense Fund (LDF) was chartered in 1939 for the purpose of, *inter alia*, rendering legal services free of charge to "indigent Negroes suffering injustice on the basis of race or color." Its first Director-Counsel was Thurgood Marshall. *See generally NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has developed a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

Since its inception, the Legal Defense Fund has sought to eradicate the race discrimination that has long infected our Nation's criminal justice system and has called attention to the corrosive effects that such bias has on cherished norms of equal citizenship. *Swain v. Alabama*, 380 U.S. 202 (1965); *Turner v. Fouche*, 396 U.S. 346 (1970); *Batson v. Kentucky*, 486 U.S. 79 (1986). Specifically, LDF has participated, as both counsel of record and *amicus curiae*, in landmark cases of this Court announcing the constitutional standards governing police-citizen encounters. *See, e.g, Terry v. Ohio*, 392 U.S. 1 (1968); *Tennessee v. Garner*, 471 U.S 1 (1985). In each, LDF sought to ensure that the Court's resolution of the Fourth Amendment issues presented was informed by a full and realistic understanding of the costs of unchecked police discretion. Not only will the harms of unconstitutional police conduct be borne disproportionately by members of groups historically singled out for unequal treatment, but such practices are particularly subversive of the police-citizen trust that is indispensable both

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[1] This brief was prepared by counsel of record for *amicus*, with significant and dedicated assistance from summer intern Kara Finck. No party or third party made any financial contribution in support of these efforts.

to effective law enforcement and to full and equal civic participation.

These concerns are squarely implicated in this case. At precisely the juncture that local, State, and federal governments are beginning to document and come to terms with the pervasiveness of unjustifiable, race-based police misconduct — ranging from harassment to use of undue and even lethal force — the State of Illinois and its various *amici* insist that the Court should pronounce flight from the police sufficient in itself to establish reasonable suspicion as a matter of law. As a matter of Fourth Amendment doctrine and empirical reality, there can be no equating the numerous and specific indicia of criminal activity held sufficient in *Terry* to overcome the Constitution's protections against seizures by the police, and the conduct here, which is wholly — and regrettably — consistent with what may be expected of law-abiding individuals in areas where mistrust and apprehension of the police run high.

The weakening of the *Terry* standard prayed for by Petitioners here would deal a serious blow to the efforts of the Legal Defense Fund and other civil rights organization to eradicate race-based police practices and to assure that the full range of constitutional rights are enjoyed no less in our nation's inner cities and "high crime" areas than in its "low crime" enclaves.

STATEMENT OF THE CASE

In the late morning of Saturday, September 9, 1995, four cars, each carrying two uniformed police officers, were driving in tandem through Chicago's 11th District. The officers were neither responding to a report or tip of criminal activity, nor searching for a particular suspect. Officer Timothy Nolan, riding in the last car, saw Sam Wardlow, a middle-aged African-American male, standing on the street corner holding a white

bag. Officer Nolan did not know Wardlow and testified at the suppression hearing that Wardlow was not violating any law or regulation at that time. JA-5. After looking in the police officer's direction, Wardlow began to run. JA-6. Officer Nolan immediately gave chase, during which he failed either to identify himself or to command Wardlow to stop. Prior to catching Wardlow, he did not see Wardlow make any effort to conceal or to hide anything. When he reached Wardlow, Nolan stopped him and immediately conducted a pat-down search of his person and bag. Upon feeling the outside of Wardlow's bag, Nolan believed it contained a weapon. A search of the bag revealed a .38 caliber revolver, and Wardlow was placed under arrest.

The trial court denied the motion to suppress, and after a stipulated bench trial, found Wardlow guilty of unlawful possession of a weapon by a felon. Wardlow was sentenced to two years in the Illinois Department of Corrections. The Illinois Court of Appeals reversed the conviction, concluding that the stop and frisk violated this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). *People v. Wardlow*, 678 N.E.2d. 65 (Ill. App. 1997). That court determined that the ambiguous nature of flight did not rise to the level of reasonable suspicion required to justify the officer's action. *Id.* at 68. It did not base its decision on Wardlow's presence in a high-crime area because it concluded that the evidence of the location was too vague to support a determination of a particular and localized high crime area. *Id.* at 67. The Illinois Supreme Court affirmed, but on a different rationale. *People v. Wardlow*, 701 N.E.2d. 484 (Ill. 1998). It concluded that flight alone in a high-crime area was not sufficient to justify a stop and frisk under *Terry*, not only because of the ambiguous nature of flight but also because of an individual's right to freedom of movement and freedom of association. *Id.* at 486–487.

SUMMARY OF ARGUMENT

In *Terry v. Ohio*, the Court accepted the argument of our nation's police that under appropriate circumstances, stop and frisk practices were necessary to ferret out crime and could coexist with the Fourth Amendment. In doing so, however, the Court set a condition precedent: prior to any such encounter, the police must possess solid factual justification that the target of the stop and frisk likely is prepared to engage in criminal behavior. This condition was established to protect core Fourth Amendment interests and to prevent groundless harassment of citizens.

As the Illinois Supreme Court recognized, the question this case presents: whether the mere fact of flight from police — either alone or in conjunction with a high-crime setting — would be a close one as a matter of abstract Fourth Amendment principle. The rights of free association and freedom of movement protected by the First, Fourth, and Fourteenth Amendments should not be causally disregarded. But the Fourth Amendment question this case presents need not — and should not — be decided as an abstract matter. As documented herein, the incidence of police harassment, mistreatment, and even physical abuse of law-abiding minority citizens is sufficiently high that a desire to avoid police contact is no longer a reliable indicator that criminality is afoot. Nor should the fact that flight occurs in a "high-crime" area be used to change the equation: the documented problems of police abuse are most serious in precisely those areas where police are most quick to presume guilt, and the protections of the Fourth Amendment must not be allowed to mean one thing for the residents of our inner cities (those who are *most* vulnerable to unreasonable and dangerous police conduct) and another for those who live in our Nation's "low-crime" enclaves.

Why an inner-city resident flees at the sight of a police officer is at best ambiguous, and cannot by itself provide sufficient indicia

that the citizen is about to commit a crime. Many residents in such communities, and particularly minority members, have in the past been harassed by some law enforcement officers and continue to suffer from such abuse. They possess a legitimate and reasonable fear of such officials. Indeed, police harassment of law abiding minority citizens is an acute problem throughout this country.

Unlike prior cases that show police had a credible working hypothesis that it was likely the suspect was about to commit a crime, the only factor possessed by police here is Mr. Wardlow's flight after seeing Officer Nolan. This factor alone, and in conjunction with the fact that these events took place in an urban community with a high incidence of crime, fails to satisfies *Terry's* reasonable suspicion test. The judgment of the Illinois Supreme Court should be affirmed.

ARGUMENT

Without More, Flight From Police Fails To Establish Likelihood of Criminal Activity.

A. *The* Terry/Sibron *Compromise: Police May Utilize Stop & Frisk Tactics But Only When Circumstances Show Ample Factual Justification That Suggests Criminal Activity Is Afoot.*

This Court's decision in *Terry* was a milestone for both the Fourth Amendment and police-citizen relations. For the first time, the Court gave its blessing to police-initiated encounters in the absence of probable cause. The Court concluded that when an officer possesses objective factors that reasonably suggest a citizen might well be about to commit a crime, the Fourth Amendment allows the officer to stop that person briefly, and if circumstances reasonably suggest the suspect might be armed, to conduct a brief pat-down search for weapons. Such "legitimate and restrained conduct undertaken on the basis of ample factual

justification" is not "unreasonable" under the Fourth Amendment, the Court concluded; indeed it exemplifies effective policing. *Id.* at 15.

At the same time, the *Terry* Court fully acknowledged the weighty constitutional and community security costs that arise when stop and frisk practices are employed in the absence of such articulable, objective factors. The Fourth Amendment right to be free from unreasonable searches and seizures is an "inestimable right of personal security," *Id.* at 8-9, and a pat-down search of a citizen's body "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be taken lightly." *Id.* at 17. "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening and perhaps humiliating experience." *Id.* at 24-25.

The Court recognized as well the judiciary's important role in securing police compliance with its rule. Because illicit use of stop and frisk tactics can "only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities, . . . courts . . . retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it *must be condemned* by the Judiciary . . . ." *Id.* at 12, 15 (emphasis added).

In application, the Court has consistently approved encounters supported by credible indicia of likely criminal activity and rejected ones that lacked adequate factual support. The *Terry* Court found Officer McFadden's confrontation and search of Terry reasonable because it took place only after attentive study of what first appeared to be innocent behavior, but as time passed strongly suggested that Terry and others were preparing to commit

armed robbery. *Id.* at 27-30. Similarly in *United States v. Cortez*, 449 U.S. 411 (1980), the Court found reasonable a stop of a truck because border patrol officers had first carefully analyzed a number of factors that, collectively, firmly suggested the truck likely contained illegal aliens and their guide. 449 U.S. at 419–420.[2]

On the other hand, the Court has not hesitated to reject as constitutionally impermissible encounters that lack sufficient indicia of wrongdoing. In *Terry's* companion case, *Sibron v. New York*, 392 U.S. 40 (1968), an eight-hour surveillance yielded only that Sibron was cavorting with several known drug addicts; the officer's subsequent search based on this information was firmly rejected as unreasonable. In *Brown v. Texas*, 443 U.S. 47 (1979), the Court determined that a citizen's presence in a high-crime area and refusal to identify himself to police lacked adequate indicia of wrongdoing. 443 U.S. at 52. In *Reid v. Georgia*, 448 U.S. 438 (1980), the Court rejected Reid's traveling with another person but walking apart from him and occasionally looking back at his companion, as insufficient suggestion of drug trafficking. 448 U.S. at 441. Thus, unless the circumstances as a whole reasonably suggest criminal behavior is likely afoot, the Fourth Amendment

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[2] *See also Adams v. Williams*, 407 U.S. 413 (1975) (finding reasonable suspicion supported by the time of day, location of the suspect in a car by themselves and informant's tip that the suspect possessed narcotics and a weapon); *United States v. Sokolow*, 490 U.S. 1 (1989) (finding police officer had reasonable suspicion to stop suspect in the airport based on a combination of over five factors which suggested when taken together that the suspect was trafficking narcotics); *Alabama v. White*, 469 U.S. 325 (1990) (finding reasonable suspicion granted to stop an individual based on an anonymous telephone tip, and subsequent corroboration as a result of independent police work). *See also Michigan v. Chesternut*, 486 U.S. 567 (1988) *and California v. Hodari D.*, 499 U.S. 621 (1991) (suggesting that no *Terry* violation occurred where police seized fleeing youths after witnessing youths discard contraband).

protection against government intrusion requires police to refrain from stop and frisk activities.

B. *The Currently Troubled State of Police-Minority Community Relations Is Highly Relevant To Understanding Why Citizens Flee From Police.*

Illinois and its *amici* ask the Court to conclude that the mere fact of flight from police in a high-crime area is sufficiently suggestive of likely involvement in imminent criminal conduct under *Terry* to justify an otherwise unconstitutional seizure and search. Illinois argues that while some avoidance behavior, such as a citizen's avoiding eye contact with the police, is not necessarily suggestive of suspicious conduct, "running away from a clearly identifiable police officer constitutes an innately suspicious reaction to the presence of police." Illinois Br. at 9. The United States argues that while flight "*may* be undertaken for innocent reasons, it is not behavior in which innocent persons commonly engage -- and it is far more likely to signal a consciousness of wrongdoing and a fear of apprehension." United States Br. at 6 (emphasis in original). Several state Attorneys General assert more boldly that when citizens face unwanted police attention, the innocent walk way, but the guilty flee. Ohio *et. al.* Br. at 5 ("A potential suspect with a guilty conscience may or may not know the police have independent information tying her to particular crimes; but when the officer shows up, the citizen does not want to stay and find out -- she runs. On the other hand, the citizen without the guilty conscience may desire to avoid interacting with police, so she declines to listen to, or to answer, police questions and walks on . . . ."). The Criminal Justice Legal Foundation (herein CJLF) asserts that a per se rule is appropriate because "flight supports reasonable suspicion because of the close relationship between flight from authority and a guilty mind." CJLF Br. at 3.

As we show below, these views ask too much. There is good reason why the majority of courts that have considered the issue have rejected this position.[3] Simply put, the circumstances under which a citizen will run from the police are too numerous, and too often based in innocence, to justify a per se rule.[4] At most, it can be but one factor among many warranting consideration. Moreover, while Illinois and its *amici* profess to accept the *Terry* principle that reviewing courts must examine the totality of the circumstances before adjudging an encounter reasonable as a constitutional matter, *see, e.g., Cortez*, 449 U.S. at 418, none discuss or consider a factor that has enormous relevance to understanding why inner-city African-American residents would flee from police. That circumstance is fear, the sincere and understandable response that many inner-city minority residents — the law-abiding no less than the criminal — to potential encounters of any type with police.[5]

C. *Overwhelming Evidence Shows That Minority Citizens Fear Law Enforcement Officers Because of Systemic Harassment and Abuse.*

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[3] *See, e.g., Nebraska v. Hicks*, 488 N.W.2d. 359, 362 (Neb. 1992) (collecting cases); *People v. Shabaz*, 378 N.W.2d. 451 (Mich. 1985); *People v. Aldridge*, 674 P.2d. 240 (Cal. 1984).

[4] *See, e.g., Hicks*, 488 N.W.2d. at 363 ("fear or dislike of authority, distaste for police officers based upon past experience, exaggerated fears of police brutality or harassment and fear of unjust arrest are all legitimate motivations for avoiding the police."); *State v. Arrington*, 582 N.E.2d. 649, 658 (Ohio Ct. App. 1990) ("it is not unreasonable for a young, black male living in a neighborhood with drug sales and liable to be stopped to run when approached by a police car...").

[5] The CJLF notes the relevance of this factor, but inexplicably limits it to "recent immigrants from police states." CJLF Br. at 25. The Americans for Effective Law Enforcement, Inc., *et. al.* brief raises generally the subject of policing minority communities, but does not discuss this issue.

There is no question the *Terry* Court was correct in recognizing the subversive effect upon both Fourth Amendment values and constructive law enforcement-community relations that result when police accost citizens in the absence of reasonable suspicion of criminal activity. Yet in many minority communities in contemporary America, youth and adults are to a staggering degree subjected to stops, frisk, beatings, and in some instances, to lethal injuries, in the absence of any wrongdoing on their part. These tragic patterns of pervasive police misconduct have many harmful consequences, not the least of which is that many minority citizens — and especially young men in inner cities — no longer perceive an approaching police officer as a benign force. To the contrary, bitter experience teaches — and empirical research confirms — that officers often initiate such encounters in bad faith, with little regard to these citizens' basic human dignity, let alone their constitutional rights.

Police experts understand the effects of unrestrained police stop and frisk activity upon a subject community. The "real problem with *Terry* is that police stop and frisk when it isn't as justified as it was in *Terry*."[6] A highly decorated-former officer believes unauthorized stops poison police-citizen relations because "a *Terry* stop says terrible things about its subject; it is the officer's way of telling a person you look wrong and I am going to check out my feelings about you even if it embarrasses you."[7] Thus:

> [a] citizen's good or poor opinion may largely be formed by the impression the citizen has of those fleeting contacts

[6] Jerome Skolnick, *Terry and Community Policing*, 72 ST. JOHN'S L. REV. 1265, 1267 (1998).

[7] James J. Fyfe, *Terry: A[n Ex-]Cop's View*, 72 ST JOHN'S L REV. 1231, 1243 (1998).

> with . . . [police]. No other state officials have the discretionary power, sometimes exercised within seconds, to consider and apply the law to a citizen, to restrain a citizen's liberty by temporary detention, to invade a citizen's privacy by search or even to injure or kill a citizen in self-defense or in protection of others.[8]

Yet despite the Court's and law enforcement's understanding of the corrosive harm that results from illicit and unwanted police-initiated encounters with citizens, the widespread practice by beat officers in many urban and minority communities is to defy rather than to comply with *Terry*'s admonitions. James Baldwin's haunting declaration from three decades ago — "from the most circumspect church member to the most shiftless adolescent, who does not have a long tale to tell of police incompetence, injustice, or brutality?"[9] — sadly is as apt today as when it was first written. This view is shared not only by police critics but also by some of the most respected voices in law enforcement.

Charles H. Ramsey, Chief of Police in Washington, D.C., noted earlier this year that "despite tremendous gains throughout this century in civil rights, voting rights, fair employment and housing, sizeable percentages of Americans today, especially Americans of color, still view policing in the United States to be discriminatory, if not by policy and definition, certainly in its day to day application."[10] One major reason for these views is stop and

[8] JOHN J. FARMER, NEW JERSEY STATE ATTORNEY GENERAL, FINAL REPORT OF THE STATE POLICE REVIEW TEAM 2–3 (JULY 2, 1999).

[9] JAMES BALDWIN, *Fifth Avenue Uptown in* NOBODY KNOWS MY NAME: MORE NOTES OF A NATIVE SON 62 (1961).

[10] PETER VENIERO, NEW JERSEY STATE ATTORNEY GENERAL, INTERIM REPORT ON STATE POLICE PRACTICE AND ALLEGATIONS OF RACIAL PROFILING, April 20, 1999 at 46 (quoting from "Overcoming Fear, Building Partnerships: Towards a New Paradigm in Police Community Race Relations" a presentation by Charles H. Ramsey given at the

frisk. "Field interrogations that are excessive, that are discourteous, and that push people around, generate friction."[11] George Kelling, a Rutgers University criminal justice professor and well known proponent of the "broken windows" theory of crime control, agrees that stop and frisk practices possess "tremendous potential for abuse," and he is deeply critical of police departments which "indiscriminately stop and frisk people."[12] Former Officer Fyfe observes that in his experience, too many officers today are "just making guesses and quite often they are wrong."[13]

One likely explanation for this state of affairs is that a significant minority of line officers believe that no countervailing consideration — be it the respect for personal security embodied in the Fourth Amendment or the equal treatment mandate of the Fourteenth — should constrain the work of ferreting out crime. A Baltimore police officer and president of the Baltimore Fraternal Order of Police openly remarked recently, "of course we do racial profiling at the train station. If 20 people get off a train and 19 are white guys in suits and one is a black female, guess who gets followed? If racial profiling is intuition and experience, I guess we all racial-profile."[14] Another experienced officer in Southern California recently confided "racial profiling is a tool we use, and don't let anyone say otherwise. . . . Like up in the valley, . . . I

Attorney General's Law Enforcement Summit, in East Rutherford, N.J. on December 11, 1998.)

[11] Skolnick, *supra* note 6 at 1267.

[12] Larry Reibstein, *NYPD Black and Blue*, NEWSWEEK, June 2, 1997 at 65.

[13] *Id.* at 66.

[14] Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAGAZINE, June 20, 1999 at 51.

know who all the crack sellers were -- they look like Hispanics who should be cutting your lawn."[15]

Minority police officers who have found the courage to speak on the record complain that in many departments, a number of fellow officers routinely harass minority citizens. Gene Jones, a black police officer in Philadelphia and a staff sergeant in the New Jersey National Guard told of the lengths that he goes to in order to avoid traveling on the New Jersey Turnpike so he will not be stopped by state patrol officers; "Yeah, I go to Jersey for Guard weekend, I take the back roads. I won't get on the turnpike. I won't mess with those troopers."[16] Several minority New Jersey State Police officers recently filed suit against that agency, confirming the prevalence of racial prejudice in its operations.[17] In another instance, a black Philadelphia police officer related that he was pulled over in a predominantly white suburb, purportedly because his inspection sticker was placed "abnormally high" on his windshield.[18]

Because these aggressive tactics flout the very law the officers are duty-bound to enforce, police departments throughout the country are seeing increased numbers of complaints of arbitrary and unfair street stops, as well as for use of excessive force,[19] and brutality.[20] Such large numbers of complaints from

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[15] *Id.* at 57.

[16] *Id.* at 60.

[17] *Minority Troopers Describe A Culture of Discrimination*, N.Y. TIMES, July 8, 1999 at B2.

[18] Goldberg, *supra* note 14 at 60.

[19] In New York, complaints of excessive force have increased 41% since the police department instituted a zero-tolerance policy. Of those complaints, 75% were filed by African-American and Latino citizens. *See* Bruce Shapiro, *When Justice Kills*, THE NATION, June 9, 1997 at 21.

minority community citizens have prompted the NAACP to announce that ending racial profiling is a top organizational priority.[21] National and local civil rights commissions are increasingly called to investigate harassing police practices.[22] In Omaha, Nebraska, the Human Relations Board recently found that there was little trust between Omaha police and African-American citizens, and that many people of color felt mistreated or harassed by the police because of their race.[23] A task force in Montgomery County, Maryland held similar hearings at which numerous witnesses recounted having been stopped because they were in predominantly white neighborhoods.[24] In Worcester, Massachusetts, the local civil rights commission held a series of hearings at which troubling and substantial allegations of racial profiling and excessive force were aired.[25] In Denver, the local newspaper listed a string of clear abuses of authority all arising in

[20] The Christopher Commission found numerous police radio messages in Los Angeles which celebrate the use of unnecessary force against citizens: "make sure you burn him if he's on felony probation - by the way does he need any breaking?," and "Did U arrest the 85 year old lady of [sic] just beat her up[?]" with the response of "We just slapped her around a bit. . . she/s getting m/t [medical treatment] now." UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY AND DISCRIMINATION 25 (May 1999).

[21] Paul Zielbauer, *Racial Profiling Tops NAACP Agenda*, N.Y.TIMES, July 11, 1999 at 23.

[22] John J. Monahan, *Hearings on Alleged Police Abuse Set*, TELEGRAM & GAZETTE, September 5, 1999 at A3.

[23] Jean Jacovy, *Chief's Move Next on Minorities Board Recommendations*, OMAHA WORLD HERALD, September 1, 1998, at 9.

[24] Katherine Shaver, *Panel Releases Report on Montgomery Police*, WASHINGTON POST, August 26, 1998, at B05. The task force also heard testimony from a parent who reported that his "teenage son had been followed repeatedly by a police officer who had threatened to kill him if he did not leave the area." *Id.*

[25] Monahan, *supra* note 22 at A3.

a single year: "a patrolman is captured on videotape aiming his gun at a woman in a holding cell; an officer kicks a suspected cop killer as a TV photographer tapes him; a seven year veteran of the police force is arrested for allegedly ramming a man with his police cruiser, then breaking his jaw with three kicks to the face."[26] In New York City, the United States Civil Rights Commission recently held hearings on the stop and frisk practice of the NYPD's Street Crimes Unit.[27]

Emerging data reveals that minority citizens are increasingly unhappy with these aggressive police practices, and that they often are the targets of distasteful encounters that rarely lead to arrest. In May of 1999, the Department of Justice released a twelve-city survey on community perceptions of law enforcement. The survey found that African-American residents were twice as likely to be dissatisfied with police practices than were white residents in the same community.[28] These data nearly mirror findings of 30 years ago.[29] A study by the Joint Center for Political and Economic Studies in April 1996 found that 43% of African Americans consider "police brutality and harassment of African-Americans a

[26] Patricia Callahan and Jeffrey A. Roberts, *63% of Police Disciplined One in Four Commit Most Violations*, DENVER POST, April 27, 1997, at A01.

[27] Kevin Flynn, *Two Polar Views of Race at U.S. Hearing*, N.Y. TIMES, May 27, 1999 § B at 5.

[28] STEVEN K. SMITH ET AL., CRIMINAL VICTIMIZATION AND PERCEPTIONS OF COMMUNITY SAFETY IN 12 CITIES, 1998, (Department of Justice, NCJ 173940, May 1998).

[29] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 146 (1967) (finding African-American citizens "significantly more negative in evaluating police effectiveness in law enforcement").

serious problem" in their own community.[30] In fact a survey of polls conducted across the nation and reported in the National Institute of Justice's Journal suggests that "many black Americans are disaffected and suspicious. They are not confident that the police will be fair. They are not confident that the police will be professional. They are not confident that the police will 'protect and serve.'"[31]

Available data on stop and frisk practices show these misgivings to be well-founded. The data show that a large number of citizens who are stopped and often frisked — disproportionately members of racial and ethnic minority groups — were engaged in no criminal conduct. Over a two-year period starting in 1997, the New York City Police Department Street Crimes Unit stopped and frisked 45,000 citizens focusing on "high crime areas."[32] Only twenty percent of the individuals stopped were arrested. The other 35,500 citizens who lived, worked and traveled in these neighborhoods were subjected to the "annoying, frightening and perhaps humiliating experience," *Terry*, 392 U.S. at 25, of police detainment despite being innocent of any of the wrongdoing of which they were "suspected." A New York newspaper survey found that 81 out of 100 randomly questioned young black and Hispanic men living in New York City had been stopped and frisked by the police at least once.[33] The survey reported that none of the 81 stops resulted in arrests. In Pittsburgh, young black males were stopped an average of 3.47 times during a

[30] Jean Johnson, *Americans' Views on Crime and Law Enforcement: Survey Findings*, NATIONAL INSTITUTE OF JUSTICE JOURNAL (September 1997).

[31] *Id.*

[32] Holman W. Jenkins Jr., *What Happened When N.Y. Got Business Like About Crime*, WALL STREET JOURNAL, April 28, 1999.

[33] Leslie Casimir, *Minority Men: We Are Frisk Targets*, N.Y. DAILY NEWS, March 26, 1999.

five year period compared to white residents who were stopped an average of 1.53 times during the same period.[34] In St. Petersburg, Florida, a study of police field interrogation reports found that police conducted street stops of more than 9,000 people over a period of twenty months, with African-American residents being stopped entirely out of proportion to their share of the City's population. A review of the reasons listed by police officers to justify the stops included standing by a pay phone, standing outside a house smoking a cigarette, and riding a bicycle the wrong way down a one-way street.[35]

A 1991 report on the Boston Police Department conducted by the Massachusetts Attorney General concluded that police officers engaged in improper, and unconstitutional, conduct in the 1989-90 period with respect to stops and searches of minority individuals.[36] The report went on to note that:

> the most disturbing evidence was that the *scope* [emphasis in original] of a number of *Terry* searches went far beyond anything authorized by that case and indeed, beyond anything that we believe would be acceptable under the federal and state constitutions even where probable cause existed to conduct a full search incident to an arrest. Forcing young men to lower their trousers or otherwise searching inside their underwear, on public streets or in public hallways, is so

[34] Ann Belser, *Suspect Black Men Are Subject to Closer Scrutiny from Patrolling Police and the Result is More Often Fear, Antagonism Between Them*, PITTSBURGH POST GAZETTE, May 5, 1996 at A15.

[35] Tim Roche and Constance Humburg, *Stops Far Too Routine For Many Blacks*, ST. PETERSBURG TIMES, October 3, 1997 at A1.

[36] JAMES M. SHANNON, ATTORNEY GENERAL, REPORT OF THE ATTORNEY GENERAL'S CIVIL RIGHTS DIVISION ON BOSTON POLICE DEPARTMENT PRACTICES 60 (December 18, 1990).

demeaning and invasive of fundamental precepts of privacy that it can only be condemned in the strongest terms.[37]

This report also documented numerous incidents of police brutality that occurred during street stops. One sixteen year-old African-American male reported being stopped, strip-searched approximately seven times, and forced to lie face down on the ground. The youth's account, credited by investigators, reported that "the officers often emerged from the cruisers with guns drawn, put the guns right to his face, and said that if he moved, they would shoot him or 'blow [his] flattop off.'"[38] A seventeen year old black male reported credibly that in 1990 while standing on a corner, two police officers said "you fucking niggers, get [out]. We don't want you hanging on the street anymore."[39] The police officer, after asking the youth what was in his mouth, hit him and threw him to the ground and then proceeded to conduct a strip search. Neither youth was arrested, let alone charged with any crime.

The Massachusetts Report concluded in no uncertain terms that "the communities hardest hit by crime must not be forced to accept the harassment of their young people as the price for aggressive law enforcement. . . . It is hardly an object lesson in respect for the law and for the police to be searched for no other reason than that you are young, black and wearing a baseball cap."[40]

In Philadelphia, when race was recorded on the police department field reports, the overwhelming majority (80.2%) of stops were of African Americans even though the districts in

[37] *Id.* at 61.

[38] *Id.* at 39.

[39] *Id.* at 44.

[40] *Id.* at 67.

question were racially integrated.[41] A review of these reports for three districts over a week revealed that the police recorded no explanation in over half of the stops.[42] None of these stops resulted in an arrest. Moreover, a number of field reports listed "stopped for investigation" as the primary reason for making the stop. Other justifications recorded by police officers included hanging out on a corner, being homeless, and observing a female in a known prostitution area.[43] In addition to the fact that these stops were based on wholly innocent activities insufficient to constitute reasonable suspicion, nearly twice as many minorities were subject to stops and frisks as compared to white residents.[44]

Recent studies also show that more often than not, minority citizens are subject to harsher treatment than whites during these encounters. The Christopher Commission's examination of police practices in Los Angeles in the wake of the first Rodney King verdict documented how minority residents were more likely to be subjected to excessive force, longer detentions not resulting in a charge, and to invasive and humiliating police tactics.[45]

[41] Plaintiffs' Fourth Monitoring Report, *Pedestrian and Car Stop Audit* at 16, NAACP, Philadelphia Branch and Police Barrio Relations Project v. City of Philadelphia, No. 96-CV-6045 (E. D. Pa. 1998).

[42] Sixty-two percent of the time the police did not record an explanation for the stop. *See id.* at 26–27.

[43] *Id.* at 12–13.

[44] *Id.* at 13.

[45] The prone-out position is a "police control tactic that requires the suspect first to kneel, and then lie flat on his stomach, with his arms spread out from his sides or his hands behind his back. The Commission received numerous accounts of incidents involving African-American and Latino males stopped for traffic infractions, who were "proned-out under circumstances that did not present any risk of harm to the officers and that did not involve a felony warrant." UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 20 at 27 n.119.

The Commission further determined that when the Los Angeles Police Department adopted a policing model emphasizing aggressive street patrol, one result was the alienation of the majority of law abiding citizens. The report concluded that these citizens "viewed the police department with mistrust, since they were perceived by the police as potential criminals."[46] In that same report, a survey of 900 police officers in LAPD found that one quarter of the respondents felt that "racial bias (prejudice) on the part of the officers towards minority citizens currently exists and contributes to a negative interaction between police and community."[47]

Increasingly, even citizens who were initially supportive of aggressive stop and frisk efforts in their neighborhoods are expressing second thoughts. As one Upper Manhattan resident recently explained, "in the beginning we all wanted the police to bomb the crack houses. But now it's backfiring at the cost of the community. I think the cops have been given free rein to intimidate people at large."[48]

Others — predominantly African-American and Latino parents — have felt sufficiently fearful of the dangers of contact with the police that they have enrolled themselves and their children in seminars that teach how to decrease the likelihood of harm when encountering the police.[49] Moreover, the Allstate Insurance Company has become so concerned with the state of police relations with youth that it recently undertook to finance a

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[46] *Id.* at 29.

[47] *Id.* at 56.

[48] DAVID COLE, NO EQUAL JUSTICE 46 (1999).

[49] *ABC World News Tonight with Peter Jennings: Lessons for Kids on Handling Police* (ABC television broadcast, March 19, 1999).

joint project with the NAACP to distribute pamphlets to youngsters on how to act when confronted by a police officer. The pamphlets, entitled "The Law and You," instruct teenagers to "avoid any action or language that might trigger a more volatile situation, possibly endangering your life or personal well-being."[50]

This glimpse of the present status of police-community relations in many areas of the country is sadly similar to the one the *Terry/Sibron* Court confronted and acknowledged three decades ago.[51] As it informed the Court's holding then that stop and frisk tactics be employed only on the basis of ample factual justification, the stubborn presence of these very same conditions today require the Court to consider, as a circumstance of this case, the fear that minority citizens in inner cities reasonably hold when they see officers of the law.

D. *Consideration of All the Relevant Facts Requires A Conclusion That Wardlow's Flight Is Not Sufficiently Suggestive of Likely Imminent Criminal Conduct to Justify a* Terry *Seizure.*

This case contrasts with those in which the Court has been willing to uphold seizures and frisks in the absence of probable cause, and resembles far more closely the ones in which the Court has found the factual showing inadequate. Unlike the careful and deliberate police work described in *Terry* and *Cortez*, Officer

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[50] *The Law and You: Guidelines for Interacting With Law Enforcement Officials* (produced in partnership by the NAACP, National Organization of Black Law Enforcement Executives and Allstate Insurance Company).

[51] *See Terry*, 392 U.S. 1, 14–15 & n.11 (affirming the necessity of the courts "to guard against police conduct which is overbearing or harassing, or which trenches upon the personal security without the objective evidentiary justification which the Constitution requires" and the fact that stop and frisk can "be a severely exacerbating factor in police community tensions").

Nolan's decision to seize and frisk Wardlow was made nearly instantly, upon Wardlow's flight, and without the development of any other fact that might have confirmed the hunch that Wardlow was about to commit a crime. Indeed, prior to seeing Wardlow, Nolan had no information of any reported crime in the area, nor was there any suggestion that Wardlow might be involved in any criminal activity. In appearance, Wardlow was violating no law. He was merely standing on the sidewalk, and like many urban residents, was carrying a bag. And even after he began to run, he broke no law, nor gave Nolan any further articulable reason to believe he was committing, or about to commit a crime, or was armed. At the moment that Nolan seized control of Wardlow and commenced to pat him down, Nolan possessed no additional information that suggested that Wardlow was violating any law. This case is much more like *Brown v. Texas* in that in both, the police acted quickly on hunches and failed to develop sufficient evidence that criminal conduct was afoot prior to the stop.

CONCLUSION

The issue that divides us from Illinois is not whether flight can be considered as a *Terry* factor, but whether flight alone satisfies *Terry's* "ample factual justification" requirement. Given the state of police-community relations, flight from police neither reliably nor sufficiently suggests that criminal activity is afoot. Because Illinois and its *amici* have failed to show otherwise, the Court should affirm the judgement of the Illinois Supreme Court.

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